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Supreme Court, U.S.
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No. 07-

In the
Supreme Court of the United States

United States of America
Respondent-Appellee,
v.
TERRY YOUNG,
Petitioner-Appellant.

On Petition for Writ of Certiorari
to the
UNITED STATES COURT OF APPEALS
for the
SEVENTH CIRCIT
No. 05-3440;
(Consolidated with 04-1950, 04-1974
and 04-2655)
And
06-2591

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QUESTIONS PRESENTED

Whether by "harmless error analysis" an appellate court can insert "large quantities of cocaine" for the "measurable quantity" of a "controlled substance" and other elements missing from the jury's verdict, as was done as to Young in *US v. Mansoori, Cox, Choice and Young*, 480 F.3d 514 (7th Cir. 2007) ("*Young II*" herein), without violating his 6th Amendment right to trial by jury.

Whether such insertion constitutes denial of an accused's demand for trial by jury and hence structural constitutional error.

Whether by "blue penciling" mandatory application of the Federal Sentencing Guidelines to avoid unconstitutionality Petitioner Young's sentence maximums can be increased without violating the *ex post facto* clause of the Constitution.

Whether re-sentencing Young to life in prison for Count 1, to 20 years each for Counts 2 and 14, and 5 years of supervised release for each of such Counts was proscribed since Young has already been incarcerated well in excess of the maximum sentence of 10 to 16 months of incarceration for Counts 1 and 2, and 33 to 41 months of incarceration for Count 14, and the 51 month maximum resulting from grouping pursuant to USSG §3D, permitted by the Federal Sentencing Guidelines based upon his jury verdict that did not

attribute to him any more than a "measurable amount" of a "controlled substance" that he distributed or conspired to distribute or that he laundered any money having knowledge of drug involvement and value.

Whether it would be inequitable to impose any supervised release, let alone the 5 years imposed that substantially exceeds the maximum permitted by the Federal Sentencing Guidelines.

Whether Young committed a federal crime.

Whether Young's indictment by one of many special grand juries sitting simultaneously and without any grand jury also sitting was a nullity.

Whether Judge Lindberg personally denying Young's 28 USC 144 affidavit and petition for his recusal was unlawful and his subsequent decisions, orders and judgments nullities therefor.

Whether 7th Circuit Court of Appeals Judges Bauer and Rovner, to whom the case was submitted pursuant to Seventh Circuit Internal Operating Procedure 6(b), should have recused themselves on the ground that they were biased against Young or that their prior conduct in the case gave that appearance, as did Judge Wood, who had also been on the panel that decided *US v. Young*, 304 F.3d. 635 (7th Cir. 2002) ("*Young I*" herein).

Whether the 7th Circuit Court of Appeal's can blithely dismiss *Young v. US*, ___ Fed. App. ___ (No. 06-251) (7th Cir. 04/06/2007) ("*Young's Forfeiture Case*" herein) for lack of subject matter

jurisdiction on the ground that forfeiture was a part of his putatively unappealed sentence when his original sentence was vacated by *Young I* as a result of his appeal.

Whether the 7th Circuit Court's endemic pattern of decision by elision of material facts and applicable legal argument constitutes an egregious violation of litigants' constitutional, statutory and judicial rights to appeal conduct of US such as to require exercise by the Supreme Court of its supervisory authority over the inferior court and the imposition of lasting remedy.

LIST OF PARTIES

The Parties to this appeal are Terry Young and the United States of America. Accordingly, service has been made on the Solicitor General as required by Supreme Court Rule 29.4.(a).

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PETITION FOR WRIT OF CERTIORARI

Terry Young respectfully petitions for a Writ of Certiorari to review the (a) Opinion of the Seventh Circuit Court of Appeals, *US v. Mansoori, Cox, Choice and Young*, 480 F.3d 514 (7th Cir. 2007), ("*Young II*" herein) which affirmed the decision of District Judge Lindberg, insofar as it relates to Young and (b) its Order in *Young v. US*, ___Fed. App.___ (No. 06-2591 (7th Cir. 04/06/207), ("*Young's Forfeiture Case*" herein).

OPINIONS BELOW

Young II was an appeal from Judge Lindberg's decisions after remand, resulting from vacation of all sentences due to errors therein discerned in *US v. Mansoori, et al.*, 304 F.3d 635 (7th Cir. 2002) ("*Young I*" herein). *Young I* is the original appeal from conviction after trial and imposition of erroneous life and other sentences imposed on Young. *Young's Forfeiture Case* was his *pro se* appeal from denial of his Federal Rule of Criminal Procedure 41 petitions challenging forfeiture of alleged substitute assets and his share of alleged assets gained from drug activities alleged in *Young I* and *Young II*.

JURISDICTION

The Supreme Court has jurisdiction pursuant to Article III of the United States Constitution and 28 USC 1254(1) as a result of the final decisions of the 7th Circuit Court of Appeals, in *Young II*, and *Young's Forfeiture Case*.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitutional provisions involved herein are Article I, §§ 8 and 9 and the 5th, 6th and 7th Amendments. Statutory provisions involved herein are the Federal Sentencing Guidelines, 18 USC 1956(a)(1)(B)(i), 18 USC 3143(b)(1), 18 USC 3145(c), 18 USC 3331-3334 18 USC 3553(b), 18 USC 3742(e), 21 USC 841, 21 USC 846, 21 USC 853(b)(2), 21 USC 881, 28 USC 144, 28 USC 455, 28 USC 994(p), USSG §§ 2D1.1, 2S1.1, 3D, and 5C1.1(e).

STATEMENT OF THE CASE

Solely on the basis of ersatz "harmless error analysis," *Young II* affirmed re-sentencing by Judge Lindberg, which resulted from the 7th Circuit Court of Appeals having vacated Young's original sentence and remanded for re-sentencing in *Young I* to comport with *Apprendi v. US*, 530 US 466 (2000), since the jury had not found any drug quantity or drug trafficking nexus with money laundering. Young had originally been convicted of one count of distributing an unspecified amount of a controlled substance in violation of 21 USC 841, one count of conspiring to distribute an unspecified amount of a controlled substance in violation of 21 USC 846 and one count of laundering an unspecified amount of money and without specifying that Young had knowledge that drugs of any value were involved.

Deciding himself a 28 USC 144 challenge to his re-sentencing Young, and constrained by his misinterpretation of the scope of the mandate, Judge

Lindberg failed to exercise any judicial discretion in denying all Young's challenges to federal jurisdiction and procedure set forth hereinafter, including indictment by the special grand jury and sentencing by a judge rather than a jury, despite Young's demand for trial by jury, and merely reduced one count from life to 20 years of imprisonment, reimposing the same sentence in all other respects, except that re-sentence as to forfeiture was ignored.

In *Young I* Judge Rovner overlooked Young's specific challenge of the precise error below to which she asserted there had not been objection as her excuse for improper appellate analysis, 304 F.3d @ 657-8, and in conjunction therewith, she also asserted as applicable a statutory default maximum of twenty years, ignoring that the Federal Sentencing Guidelines, which were a limitation within the statute, mandated a 16 month maximum with respect to "measurable amounts" of narcotic. Although the same regime would have applied to money laundering, she did not address the absence of value determination by the jury, nor, indeed, lack of drug involvement knowledge. That latter, indubitably, would have come within the penumbra of the presupposition she had applied to drug quantity, that, given a "properly worded" indictment a "properly instructed" jury "would have found" defendant guilty of whatever the federal government might

have asserted, 304 F.3d @657-8,[1] rendering harmless whatever error might have been committed by Judge Lindberg.

Judge Rovner's opinion in *Young I* asserted:

> For all of the foregoing reasons, we AFFIRM the defendants' convictions but VACATE their sentences and REMAND for resentencing in accordance with this opinion. [304 F.3d @ 667]

The remand was to Judge Lindberg despite the appearance of, and actual, bias demonstrable from the record, which had consequence in his having proceeded with an anonymous jury on grounds of "crimes of violence," his clearly erroneous imposition of a life sentence in obvious violation of the law, and other serious errors, 304 F.3d 635, *passim*.

Although the sentence was vacated, Judge Lindberg concluded that only Count 1 need be revised. While Young was without counsel, he filed motions to quash the indictment with prejudice, to preclude sentencing by judge, for bail pending sen-

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[1] Such presupposition is facially illegitimate as speculation substituted for fact and a violation of Young's constitutional rights to confrontation, trial and due process. *Blakely v. Washington*, 542 US 296 (2004), *Ring v. U.S.*, 536 US 584 (2002), *Harris v. U.S.*, 536 US 545 (2002), *Apprendi v. New Jersey*, 530 US 466 (2000), *In re Winship*, 397 US 358 (1970), *Duncan v. Louisiana*, 391 US 145 (1968), *Russell v. U.S.*, 369 US 706 (1962).

tencing and for Judge Lindberg's recusal pursuant to 28 USC 144.

Young's motion to quash indictment with prejudice asserted that the drug laws were unconstitutional, that possession, the essential element of the drug laws with which Young was charged, could neither be alleged *bona fide* in the indictment nor proven because the possibility of possession had been eliminated by legislative fiat as expressed in 21 USC 881(h), that the indictment was a nullity because it was issued by a special grand jury which had no right or power to issue it, special grand juries having no such right or power [18 USC 3333] or, if they do, there were more than the number permitted extant and acting simultaneously under their constitutive statute [18 USC 3332], and no grand jury sitting to which a special grand jury could be a lawful adjunct.

Young's motion to preclude sentencing by judge asserted that the jury finding of "a measurable quantity" of drugs when the indictment did not allege drug quantity constituted an unconstitutional amendment of the indictment, that the introduction of drug quantity at original sentencing by the prosecution was an attempt to effect an amendment of the indictment, which the judge permitted, likewise by unconstitutional means as only a grand jury may amend, not a petit jury, prosecutor or judge, that the jury Young selected for the trial of his case had been discharged and could no longer render sen-

tence, that the Sentencing Guidelines pursuant to which Young was going to be sentenced were unconstitutional and that, even if sentence could now be imposed, he could not be sentenced to more than 16 months of the more than six years that he had already served since that was the maximum sentence range based upon the "detectable quantity" found by the jury, applying the proper sentence guideline thereto: Level 12 under USSG § 2D1.1.

Judge Lindberg denied all Young's motions, including the motion for recusal which would have required reference to another judge according to 28 USC 144. In so doing, Judge Lindberg failed to exercise any judicial discretion, asserting:

> Most of the arguments of defendants would require the Court to go beyond the scope of the 7th Circuit's mandate, which this Court may not do in this remanded case. The only...issues for re-sentencing are...the sentence[] to be imposed on Defendant[] Young on Count 2 of the superseding indictment following the vacation of life sentence...

thereby presaging abuse of judicial discretion *per se*.

Thereupon Young timely filed his petition for mandamus in the 7th Circuit Court of Appeals to recuse Judge Lindberg and for clarification of the mandate. The panel, consisting of Judges Coffey, Easterbrook and Evans "unfiled" his petition on the

false premise that he was represented by counsel. His petition for recusal of that panel for prejudice and for reconsideration of his original petition *en banc* was "unfiled" by that same panel.

Judge Lindberg rendered his amended judgment on 8/3/05 without the explanation required by Circuit Rule 50.

In *Young II* Judge Rovner affirmed Judge Lindberg's re-sentencing, asserting that even though she had misjudged on the basis of plain error analysis there was no difference, as the error of the jury not having been asked by the prosecution and therefore not having determined any quantity of drugs and money for purposes of sentencing beyond the minimum was "harmless." Therefore, a sentence of life was affirmed as to the conspiracy count (21 USC 846) and 20 years as to the distribution count (21 USC 841), Judge Rovner ignoring that both are based on the same statutory and guideline criteria and in excess of the guidelines for the offenses of which the jury found Young guilty! *Young II* totally ignores Young's position that the maximum sentence imposable under the Federal Sentencing Guidelines is 16 months of incarceration for Counts 1 and 2, and 41 months of incarceration for Count 14 based upon a jury verdict that did not attribute to him any more than a "measurable amount" of a "controlled substance" that he distributed or conspired to distribute or that he laundered any money having knowledge of drug involvement and value.

The Order of Circuit Judges Posner, Wood and Williams in *Young's Forfeiture Case* premised dismissal on Judge Lindberg lacking subject matter jurisdiction because the forfeiture was a part of Young's sentence in his criminal case, thereby totally ignoring vacation of the total sentence in *Young I* and that Judge Lindberg had not reimposed that component of Young's sentence on remand. The government has no legal basis to hold any funds pursuant to a vacated forfeiture.

REASONS FOR GRANTING THE WRIT

"What If" Analysis is "Cataclysmic" Error. In the guise of "harmless error" analysis, *Young II* affirmed Young's sentence on the basis of an ersatz "what if" analysis, which violates the most basic right of a criminal defendant to trial by jury as guaranteed by the 6th Amendment. When a defendant demands his right to a trial by jury, how can its usurpation by Judge Lindberg, let alone Circuit Judge Rovner and her panel not denigrate the fairness, integrity and public reputation of the proceeding?

One cannot bypass this basic right by speculation that the jury would have sentenced Young on the basis of gross quantities of drugs had the jury just been asked to do so. Why have a jury trial at all if the judges can just assume what a "properly instructed" jury would do? Such a construction is the ultimate egregious denial of trial by jury, the right of appeal and due process, a grotesque circumvention of the rule of law. To permit such a perversion

would be patent evil, not just "harmful," "plain" or "structural" error. It is "cataclysmic" error that abrogates all of the individual safeguards against the encroachments of tyranny!

Denial of Jury Demand is Structural Error. More broadly, sentencing should be a jury function instead of a judge's function as the strictly construed Constitution would so mandate. In that vein, distinguishing *sentencing factors* from *elements* to preclude the jury from sentencing is disingenuous. Although the Constitutional language of both is identical, that bifurcation does not exist in civil cases. There is no constitutional reason for it to be different in the criminal case. A defendant who wants to avoid sentencing by his peers can opt for a bench trial just as the civil litigant can. A defendant who wants trial by his peers is entitled to have their decision with respect to his innocence as well as his sentence should he be found guilty. The reasons for any different scheme are sinister, to avoid jury control and nullification, to make it a rubber stamp for the Sovereign. That was supposed to have been remedied in consequence of the 1670 London jury trial of William Penn. Although the methods may be more genteel today, the same results are intended by the current regimen. Denial of demand for trial based upon positing a *virtual verdict* in place of the actual verdict is no less "structural" error than denial of the right to public trial, *Waller v.* Georgia, 467 IS 39 (1984), which of course a *virtual* jury

does, denial of the right to an unbiased petit jury, *Georgia v. McCollum*, 505 US 42 (1992), denial of the right to an unbiased grand jury, *Vasquez v. Hillery*, 474 US 254 (1986), the equivalent of the *virtual indictment* by which *Young I* was commenced, the imposition of counsel not of one's choosing, *U.S. v. Gonzalez-Lopez* (05-352) US (6/26/06), or conviction on a defective reasonable doubt standard, *Sullivan v. Louisiana*, 508 US 275 (1993).

"Blue Penciling" Mandatory Application of the Federal Sentencing Guidelines to Avoid Unconstitutionality Cannot Increase Petitioner Young's Sentence Maximums in Violation of the *Ex Post Facto* Clause of the Constitution. Justice Breyer's remedial adjunct to *Booker v. U.S.*, 535 US 220 (2006) eliminated the mandatory aspect of the federal sentencing guidelines as unconstitutional. He stated that this was essential to save the guidelines and best serve Congress' goals, while recognizing that such remedy was at best "honor in the breach" because an essential feature of Congress' sentencing scheme had been its being mandatory.

Whether his is proper interpretation need not be addressed here, as the crimes of which Young was convicted occurred well before *Booker* at a time when the Guidelines were mandatory; at a time when it was well established that the guidelines in effect at sentencing were binding on the sentencing judge unless the *ex post facto* protections of the

Constitution required otherwise, in which case the guideline in effect at the time of the offense was mandated. *U.S. v. Bader*, 956 F.2d 708, 709 (7th Cir. 1992). The 7th Circuit espoused a mix and match approach which resulted in most benefit to the defendant in sentencing from what for the defendant is the best of each guideline. *U.S. v. Anderson*, 61 F.3d 1290, 1303 (7th Cir. 1995). Sentencing changes that occurred after the charged conduct but before sentencing would not be applied if to do so would increase the sentence because that would violate the *ex post facto* clause of the Constitution. *U.S. v. Seacott*, 15 F.3d. 1380, 1386 (7th Cir. 1994). However, the 7th Circuit did not apply these principles to Young.

A judicial construction of a criminal statute is subject to the same *ex post facto* constraints as a legislative revision. *Bouie v. City of Columbia*, 378 US 347 (1964), *Marks v. U.S.*, 430 US 188 (1977), *Rogers v. Tennessee*, 532 US 451 (2001) hold that if a judicial construction of a criminal statute is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue, the judicial construction must not be given retroactive effect.

There can be no question that the change in the sentencing scheme effected by Justice Breyer's remedial solution to an otherwise unconstitutional sentencing guideline, i.e. to make them advisory rather than mandatory as set forth in 18 USC

3553(b), was unexpected and indefensible by reference to the law theretofore. That's why his remedy required excision of the cited section to eliminate the mandate to judges that they must follow the guidelines, 18 USC 3742(e) which provided for *de novo* appellate review, and the substitution therefor of "reasonableness" as the standard for such review.

As clear further demonstration that Justice Breyer's removal of the sentencing guideline mandate was unexpected and indefensible, consider that none of the parties and none of the amici briefed or sought the remedy that Justice Breyer foisted on them. To them, and to all, it was inconceivable because it was directly and clearly contrary to the will of Congress. That is why Justice Breyer had to eliminate portions of the statute as unconstitutional. Even Justice Breyer admitted that his redefinition of the federal sentencing scheme was "radical." He apologized by saying his remedy would depart less radically than a total declaration of unconstitutionality. That is highly questionable given how central to the Congressional scheme was mandatory application. What precedent is there for what Justice Breyer did? Typically, a statute will make provision for severance, if that is the desire of the legislature, so that the remainder will still stand. Without such a provision, the remainder will not stand. A severance provision is not to be found in the criminal code. The courts do not "blue pencil" legislation because doing so is legislating in clear violation

of the separation of powers embedded in the Constitution and our federal culture of checks and balances. Although Justice Breyer had the last word, that word was unexpected and indefensible based upon prior law. Accordingly, Young is protected from what Justice Breyer did, as it has only prospective effect. In consequence, Young's sentence is limited to the maximums indicated above.

Booker changes nothing for Young because *Apprendi*, and *Blakely*, and, yes, *Jones v. U.S.*, 526 US 227 (1999), upon which he relied and cited as basis for his objections, are confirmed by *Booker*. Furthermore, the interpretation that *Booker* has been given by the inferior courts cannot be applied to Young because that interpretation would violate the *ex post facto* clause of the United States Constitution.

Young is entitled to that aspect of *Booker* which confirms the application of the *Apprendi* and *Blakely* principle to the Federal Sentencing Guidelines, that principle being that the sentencing judge is confined to the facts determined beyond a reasonable doubt by the jury. That aspect of *Booker* which releases the sentencing judge from the mandate of the Guideline caps cannot apply to Young because the Constitution prohibits it.

Grouping of the distribution, conspiracy and money laundering counts is mandated by the Sentencing Guidelines as they are applicable to Young because of the rules regarding which guideline is

applicable and the *ex post facto* clause of the U.S. Constitution. The maximum sentence to which the proper analysis could lead is 51 months!

Young's Sentence Violates the Constitution as it is Not within the Limitations of the Federal Sentencing Guidelines as Determined by the Actual Jury Verdict. Re-sentencing Young to life in prison for Count 1, to 20 years each for Counts 2 and 14, and 5 years of supervised release for each of such Counts has been proscribed because at the time of re-sentencing Young had already been incarcerated well in excess of the maximum sentence permitted by the Federal Sentencing Guidelines based upon his jury verdict that did not attribute to him any more than a "measurable amount" of a "controlled substance" that he distributed or conspired to distribute, or that he laundered any money having knowledge of drug involvement and value. Base Offense Level 12 is the level for the least amounts of heroin, cocaine and cocaine base, under the Drug Quantity Table set forth at USSG §2D1.1. Since the jury did not find any quantity of these drugs, 304 F.3d @ 657-8, Level 12 is the mandated offense level for sentencing Young. The Sentencing Table set forth as Part A, Chapter Five of the Federal Sentencing Guidelines mandates a sentence range of 10 to 16 months of incarceration for Level 12, Criminal History Category I (Young's Category since he had no Criminal History Points because he had no prior criminal history). This range applies

equally to 21 USC 841(a) drug distribution and to 21 USC 846 conspiracy offenses, the latter section specifically so stating. As Young was convicted of money laundering in violation of 18 USC 1956(a)(1)(B)(i), without jury finding that Young knew or believed that the funds were proceeds of an unlawful activity involving manufacture, importation, or distribution of controlled substances and without jury designation of value, the maximum Base Offense Level is 20 as set forth at USSG §2S1.1. Therefor, the Sentencing Table set forth as Part A, Chapter Five of the Federal Sentencing Guidelines mandates a sentence range of 33 to 41 months of incarceration where Criminal History Category I obtains for Young who had no prior criminal history.

Also, Counts 1, 2 and 14 are duplicitous. Also, they constitute overcharging as repetitive counting for the same conduct. For that, and because the Sentencing Guidelines require quantity and value based Counts to be grouped so that they can be aggregated, Counts 1, 2 and 14 should have been treated as one for sentencing, resulting in one just sentence.

USSG §3D provides for grouping of multiple counts for sentencing for offenses under certain guidelines, including specifically USSG §2D1.1 (drug distribution) and §2S1.1 (drug conspiracy) [§3D1.3]. If they are treated as one group, the maximum total sentence could be 41 months. If

they are treated as separate groups, the highest would be money laundering (Level 20). Since 2D1.1 is eight levels lower it is counted under 3D1.4 as ½ unit and one level is added to Level 20, making the allowable punishment range 41 to 51 months. Consecutive sentencing is not permitted in Young's circumstances under the applicable guidelines.

That these limitations based on the facts established (or not) by the jury are the maximums applicable to Young has been confirmed by *Booker v. U.S.*, 535 US 220 (2006), *Blakely v. Washington*, 542 US 296 (2004), *Apprendi v. New Jersey*, 530 US 466 (2000), and most recently, *Cunningham v. California* (05-6551), US (1/22/07). That they are in the Sentencing Guidelines and not the Statutes has no effect on this conclusion. The Federal Sentencing Guidelines have the same force of Congressional edict as any other statutory enactment, having been presented to Congress and not disapproved in accordance with Congress' statutory procedure therefor under 28 USC 994(p). Also, the Supreme Court has consistently held that the Federal Sentencing Guidelines have the force and effect of laws, *Booker*, *Mistretta v. U.S.*, 488 US 361, 391 (1989), *U.S. v. Stinson*, 508 US 36, 42 (1993), because the Guidelines were mandatory and therefore binding on judges. See also *U.S. v. Dunnigan*, 507 US 87

(1989), *Witte v. U.S.*, 515 US 389 (1997) and *Edwards v. U.S.*, 523 US 511 (1998).

Young Did Not Commit A Federal Crime. The reasons are statutory, constitutional, and judicial. Statutorily, Congress precluded the offenses of which Young was convicted by legislative fiat. Possession is an essential element of 21 USC 841. 21 USC 846 is premised on agreement to violate a Title 21 offense. If there is no legal possibility of a violation of 21 USC 841, a violation of 21 USC 846 cannot exist either. If there is no predicate offense, an essential element of 18 USC 1956 is missing. Without possession or the possibility of possession, this chain of offenses in discatenated. Young was legally incapable of possessing a controlled substance, a required element of the crime of which he was charged in one Count of his indictment, violation of 21 USC 841. This is because his ability to possess had been eliminated by 21 USC 881. Absent possession or its possibility, there can be no violation of 21 USC 846 or 18 USC 1956. 21 USC 881(a) provides that there shall be no property right in any controlled substance which has been manufactured, distributed, dispensed, or acquired in violation of federal drug law. 21 USC 881(h) provides that all right, title and interest in property described in 21 USC 881(a) shall vest in US upon the commission of an act giving rise to forfeiture under 21 USC 881. Possession is such an interest. Furthermore, 21 USC 853(b)(2) specifically includes

within its definition of property subject to forfeiture "tangible and intangible personal property, including rights, privileges, interests, claims and securities." In other words, it includes everything.

Accordingly, any predecessor act to Young's alleged possession resulted in his inability to have any property right cognizable under law, e.g. possession. The indictment itself alleges acts by others violative of Title 21 which are prior to Young's alleged possession. The indictment is a judicial admission by the United States. Judicial notice must also be taken that the drugs involved in this case are obtained initially solely by importation from foreign countries, a violation of Title 21. Hence, numerous prior acts of others in violation of Title 21 occurred that precluded Young having possession as a matter of law. Absent possession, which has been precluded by federal legislative fiat, Young could not have possessed with intent to distribute as required by the distribution Count, nor agreed to do something violating Title 21 as required by the conspiracy Count, nor committed a predicate offense as required by the money laundering Count. Accordingly, the indictment, the prosecution and the conviction must be quashed as a nullity.

Where the evidence taken most favorably to the prosecution is insufficient to prosecute or convict, the defendant should not be dragged through the demeaning and debilitating process of pre-trial incarceration and trial, *U.S. v. CIO*, 335 US 106

(1948), only to have the case thrown out because, taken most favorably to the prosecution, there is insufficient evidence to sustain a conviction by a rational jury. *Jackson v. Virginia*, 443 US 307 (1979). Here, US got the verdicts it sought, one without "drug quantity," another without a finding that Young "knew or believed that the funds were proceeds of an unlawful activity involving manufacture, importation, or distribution of controlled substances and without jury designation of value," so that US could get the outrageous sentence it wanted without having to present to the jury their despicable schnitz,[2] and suffer the crucible of convincing a jury beyond a reasonable doubt and possible jury nullification. However, US' avoidance scheme came abruptly to an end with *Jones*, *Apprendi*, and *Blakely*. *Young I* occurred in that crevice between *McMillan v. Pennsylvania*, 477 US 79 (1986), and *Booker* wherein the constitutional right to jury determination of "sentencing factors" was acknowledged and recognized as compelling mandated sentence guide limitations. That meant for Young that the jury had not found the facts necessary to sentence him beyond the bare minimum as determined by the Federal Sentencing Guidelines, which were still mandatory at the time of his sentencing so that

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[2]Worse than a snitch who tells on another, a schnitz (Bronson, Buchanan, Carter, Hunt, Teague) is one who made up what is told, frequently as the result of prosecutorial coercion or bribe!

US was stuck with what the jury had determined rather than whatever the judge might do to Young based on preponderance, or, in this case, speculation. That meant US got caught in the switches in cases like Young's. Judge Rovner completely ignored this reality, however, by asserting that a *virtual jury* could substitute for the actual jury in Young's case and render a *virtual sentence* based on her "what if" analysis, thus wiping out the actual indictment, the acutal verdict and the constitutional rights that Young obtained when he demanded a jury trial. Were "trial by jury" interpreted in the criminal context in the same way as in the civil context, pp. 9-10 *supra*, the sentencing mess in which the courts are now mired would be avoided completely.

Constitutionally, US was not intended by the Founding Fathers to prosecute the kinds of offenses of which Young was convicted. US has limited powers. Its limited legislative power was vested in Congress. Article I, § 8 confined Congress' powers to legislate crimes to: counterfeiting US securities, currency and coins; piracies and felonies committed on the high seas; offenses against the Law of Nations; and crimes committed by members of the militia and by persons on federal enclaves. US has relied on the Commerce and Necessary and Proper Clauses of the Constitution as the basis for circumventing these limitations. Innumerable unconstitu-

tional statutes are based thereon, including 21 USC 841, 21 USC 846 and 18 USC 1956.

The Commerce and Necessary and Proper Clauses are an unconstitutional basis for enacting criminal laws. The former was meant to protect commerce from the encroachments of foreign nations, the States and Indian Tribes only. The establishment of the federal government as one limited to authority delegated by the Constitution means that there is no federal common law of crimes. Tunis Wortman's *Treatise* (NY,1800), pp. 229-230, 253. Were it otherwise, the Drafters of the Constitution would not have had expressly "to provide for the punishment of counterfeiting the securities and current coin of the United States" [Article I, Section 8, Clause 6], there being also the power "to coin money, regulate the value thereof..." [Article I, Section 8, Clause 5]. They would not have had "to define and punish piracies and felonies committed on the High Seas and offenses against the Law of Nations." [Article I, Section 8, Clause 10.] The Commerce Clause would have taken care of that. This simplest comparison of such powers as to which Congress is also given specific criminalizing power guts any credible argument that the Commerce Clause itself confers criminalizing powers.

The Necessary and Proper Clause of the Constitution was not meant to enlarge the powers of the federal government, but merely to make possible execution of the limited powers ceded to the federal

government as set forth specifically in the Constitution. *Ibidem*, pp. 231, 238-9.

The Supreme Court should not perpetuate misuse of the Commerce and Necessary and Proper Clause as described herein. Such misuse is an execration of the Constitution.

Judicially, Young's indictment by one of many special grand juries sitting simultaneously instead of by a grand jury was a nullity. Defendant Young was indicted by special grand jury in 1997. A special grand jury is formed pursuant to, governed and restricted by 18 USC 3331-4. 18 USC 3333(a)(1) provides that the duty of the special grand jury shall be to render reports regarding criminal activity in the district. 18 USC 3334 makes the grand jury provisions of chapter 215 of Title 18 and the federal rules of criminal procedure applicable to special grand juries to the extent not inconsistent with Sections 3331-4. Thus, general secrecy and appearance provisions are applicable to special grand juries because no provision is made in Sections 3331-4 therefor and nothing in Sections 3331-4 is inconsistent therewith. Not so the indictment provision. There is no mention of it in Sections 3331-4, but it is inconsistent with the stated purpose and duties of the special grand jury as stated in 18 USC 3331-3 to render reports. Therefore the special grand jury indictment of Young is a nullity. 18 USC 3331(a) provides various criteria for the formation of a special grand jury, among them to relieve the grand

jury of some of its obligation to investigate when the volume of business appropriate for a special grand jury, i.e. the investigative function, exceeds the capacity of the grand jury to discharge its obligations, i.e. the investigative and indictment functions. Although legislative authorization is confined to one special grand jury, not any number, numerous special grand juries were sitting in the Northern District of Illinois at the time that the special grand jury sat with respect to Young's indictment and issued it. In addition, on information and belief, at such time there was no grand jury sitting in the Northern District of Illinois, Eastern Division, other than special grand juries. Accordingly, the statutory basis for the special grand jury that indicted Young did not exist and the empanelment of such special grand jury and its conduct, including its investigation and issuance of the indictment against Young was a nullity. 18 USC 3331(a) authorizes "a" special grand jury if special criteria are met. Had Congress meant more than "one," it knew how to write "one or more" or "special grand juries" rather than "a special grand jury," which is what it did write.

Judicial Bias. Judge Lindberg personally denying Young's 28 USC 144 affidavit and petition for his recusal was unlawful and his subsequent decisions, orders and judgments nullities therefor. 28 USC 144 provides that another judge than the subject of the affidavit filed pursuant thereto shall be substituted immediately for such subject

judge to hear the matter. This section is unlike 28 USC 455 under which the subject judge makes his own determination whether he is prejudiced. Yet Judge Lindberg, the subject judge, took unto himself this determination on the merits in violation of 28 USC 144, thereupon denied Young's motion for bail, which is based upon the apodictic statements of the *pro se* motions to quash the indictment to preclude sentencing by judge, all of which he also denied, and sentenced Young based upon his misconstruction of the mandate from the 7th Circuit Court of Appeals, which, although itself not the least bit confusing, is, admittedly, part of an opinion by Judge Rovner which is confusing, because it is self-conflicting and premised on an erroneous reading of the sentencing transcript, penalty statute [21 USC 841(b) and guidelines [USSG § 2D1.1]. The rulings that he made thereupon were therefore a nullity.

Recusal pursuant to 28 USC 144 is mandatory once a party has submitted a timely and sufficient affidavit and counsel submits a timely statement that the affidavit is made in good faith. *U.S. v. Sykes*, 7 F.3d 1331 (7th Cir. 1993). Instead, Judge Lindberg decided Young's motion for recusal on the basis that he was not biased, which is contrary to 28 USC 144 and to the admonition of *U.S. v. Horton*, 98 F.3d 313 (7th Cir. 1996) that the judge must assume the truth of factual assertions even if he knows them to be false. Judge Lindberg did not

address the two items which a judge the subject of the recusal effort has been permitted, i.e. the timeliness and sufficiency of the affidavit. Nor did he question the counsel's certificate, which, necessarily Young signed as his own counsel. Therefore the matter is simply one of Judge Lindberg having violated 28 USC 144 by proceeding to deny the motion.

Indeed, Young's affidavit was sufficient and timely. The affidavit was filed before any substantive rulings were made by Judge Lindberg in the proceeding for re-sentencing. To be sufficient, an affidavit must state facts and reasons for the affiant's belief that bias or prejudice exist and give fair support to the charge of a bent mind that may prevent or impede impartiality of judgment. Such assertions may be made on information and belief. *Berger v. U.S.*, 255 US 22 (1921), *Turner v. Kerner*, 186 F.2d 79 (7th Cir. 1950). Young's affidavit did this. Much of the affidavit describes so-called "extra-judicial" influences and expressions of bias, i.e., his daughter's book, his affiliation and association with his daughter and son-in-law, who are both steeped in the investigation and research of gang activities and events which Judge Lindberg ascribed to Young. However, Young also referred to Judge Lindberg sentencing him to life in prison which so far exceeded the applicable guidelines as to reek of bias; his false positing that Young was

guilty of a crime of violence and therefore would not be considered for a downward departure based on diminished capacity, another of Judge Lindberg's propositions so obviously erroneous as a matter of law as to also reek of bias. Likewise, Judge Lindberg's imposition of restitution unlawfully! Normally one would say that these would be left for appeal. Indeed, here the Court of Appeals reversed and remanded because of them in themselves. In *Liteky v. U.S.*, 510 US 540(1994), the majority (Rehnquist, O'Connor, Scalia, Thomas and Ginsburg) asserts a higher standard for bias arising during the course of judicial proceedings than bias from extrajudicial source. Justice Scalia, its author, also asserts that the so-called "extrajudicial source" doctrine is not much of a doctrine and appears to abandon it, relegating the concept to a mere "factor" in the total analysis. *Id.* @ 489-90. The concurring minority (Blackman, Stevens, Souter and Kennedy) correctly states that the higher standard is not a fair interpretation of the statute and not substantively different from the *per se* rule which the majority rejects. *Id.* @ 496. Technically, both majority and minority are addressing 28 USC 455(a). The majority, Id. @ 489-90, and the minority, Id. @ 494-5, agree that an allegation concerning some extra-judicial matter is not a necessary condition for disqualification under any of the recusal statutes. Indeed, 28 USC 144 is quite mechanical. It takes no account of the source

of the bias. the affidavit describes a pervasive and continuing bias, especially when supplemented by the confirmation made by Defense Attorney Clavelli, who was appointed by Judge Lindberg, and memorialized in Young's motion to dismiss appointed counsel. Clavelli confirmed that Judge Lindberg was so prejudiced against Young that he would probably want to reimpose a life sentence even though that would be contrary to the opinion of the 7th Circuit Court of Appeals, that Judge Lindberg had it in for Young. Judge Lindberg would not re-sentence with respect to Count 1; he would let Young's life sentence stand, no matter what Judge Lindberg did with respect to Counts 2 and 14. Had the 7th Circuit Court of Appeals intended that consequence, it would have decided that the error related solely to Count 2 was harmless, as Young has but one life to give. Remand would have been for the limited purpose of the downward departure and restitution and the mandate so limited specifically. However, at the outset and at the end of Judge Rovner's opinion, the mandate is expressed generally and without limitation. The sentences are vacated and the case is remanded for re-sentencing. The scope of the mandate is determined by the order of remand. *U.S. v. Parker*, 101 F.3d 527, 528 (7th Cir. 1996). Remand for resentencing must permit the parties to raise all issues relevant thereto and the judge to whom

the matter is remanded must be made to understand that. Otherwise, perpetual Sisyphusian appeals will likely rut Justice' steep into oblivion. As set forth in Young's bail motion, the criteria for release are set forth in 18 USC 3143(b)(1). He met the one overriding criterion thereof, that he is "a person for whom the applicable guidelines promulgated pursuant to 28 USC 994 does (sic) not recommend a term of imprisonment." The guidelines do not recommend a term of imprisonment for a person who has already served substantially in excess of any sentence that could be imposed under the guidelines. Young had served over nine years in prison.

As sentence beyond the limits is a matter of law, no further factual findings at the trial level are necessary. In addition to the appellate powers conferred by 18 USC 3145(c), 18 USC 3141(b) confers on a "judicial officer of a Federal appellate court" the power to release Young pending and appeal also.

Certain judges of the 7th Circuit Court of Appeals should have recused themselves on the ground that they are biased or that their prior conduct in the case gave that appearance. Circuit Judges Coffey, Easterbrook and Evans were specifically cited in a petition for *en banc* reconsideration, which Young attempted to file in the 7th Circuit Court of Appeals following their "unfiling" his initial Mandamus Petition there. These judges were also included with

Judge Lindberg in Young's petition for writ of mandamus to the Supreme Court to compel their recusal for bias and the appearance of bias. In all Young's filings, Judge Rovner had been severely criticized for her erroneous opinion, which has delayed justice for Young. Young suggested these judges remove themselves from any involvement in his case on the basis of bias or, at least, the appearance of bias as their consciences and their duties pursuant to 18 USC 455 would dictate. They did not; thus compounding the injustice that is this case.

The Forfeiture of Young's Assets is a Nullity because there is no judgment extant to support it.. The 7th Circuit Court of Appeals would like to have it both ways, but it cannot without violating basic law and common sense. The panel (Judges Posner, Wood and Williams) affirmed the forfeiture on the basis that the district court (Judge Lindberg) lacked subject matter jurisdiction over Young's Rule 41 motions because forfeiture is a part of his criminal sentence. In so doing, that panel ignored *Young I*, which had vacated Young's entire criminal sentence. In so doing, that panel also ignored that Judge Lindberg had not re-sentenced Young to forfeiture. In so doing, that panel also ignored that *Young II* did not address forfeiture either.

The 7th Circuit Court of Appeals Needs Supreme Court Supervision. The 7th Circuit in *Young I*, *Young II*, and *Young's Forfeiture Case*, and repeatedly in other criminal appeals ignores the

facts of record, makes up what suits its purposes, and proceeds on its preconceived prejudices to wrong decisions. The *virtual jury verdict* posited by Judges Rovner and the *virtual forfeiture* posited by Judge Posner are but recent examples in a long line of *virtual appeals*. Numerous other examples are available, but already the Supreme Court has many examples in its files that offer convincing evidence of the need for Supreme Court supervisory intervention of the 7th Circuit Court of Appeals.

CONCLUSION

As *Young I*, *Young II* and *Young's Forfeiture Case* proceeded from a *virtual indictment*, as a *virtual jury verdict* was substituted for the actual jury verdict in *Young II* based on the 7th Circuit Court of Appeals ersatz "what if" analysis, as an unconstitutional sentence, including life imprisonment, was imposed on Young, as Young committed no federal crime, as Young was indicted by a special grand jury, which had no such power, and therefore the indictment was a nullity, the Supreme Court must grant the writ so that these egregious constitutional violations will be remedied and Young be freed.

Respectfully Submitted,

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